147

(1) Supreme Court, U.S.
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No. 09-672 NOV 25 2009

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In The

Supreme Court of the United States

MARCOS RODRIGUEZ,

Petitioner,

vs.

DAVID McCAULEY, WARDEN,

Respondent.

On Petition For Writ Of Certiorari
To The First Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

RAYMOND STEVEN SUSSMAN, ESQUIRE
Attorney at Law
4523 Avenue H
Brooklyn, New York 11234-1409
Telephone 718-338-3302

Counsel for Marcos Rodriguez

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

QUESTION NUMBER 1

MAY A FEDERAL DISTRICT COURT REVIEW STATE ERRORS RESULTING IN A DENIAL OF AN INDIVIDUAL'S FEDERAL PROTECTED CONSTITUTIONAL RIGHTS IN A FELONY MURDER PROCEEDING INCLUDING DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAW?

QUESTION NUMBER 2

DID THE STATE OF RHODE ISLAND VIOLATE THE DEFENDANT'S RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF THE LAW UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF RHODE ISLAND?

QUESTION NUMBER 3

WAS THE DEFENDANT ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE IF THE *BARTKUS* EXCEPTION TO THE DUAL SOVEREIGNTY DOCTRINE WAS APPLICABLE?

LIST OF PARTIES

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

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[x] For cases from **federal courts**:

The opinion of the United States court of appeals appears at App. 1 to the petition and is

[x] is unpublished.

The opinion of the United States district court appears at App. 3 to the petition and is

[x] is unpublished.

JURISDICTION

[x] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was *AUGUST 28TH, 2009.*

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 2241. Power to grant writ:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is

filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e)

(1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(3) The Constitution of the State of Rhode Island, Article I, Sections 1, 2 and 7.

Section 1. Right to make and alter Constitution – Constitution obligatory upon all. – In the words of the Father of his Country, we declare that "the basis of our political systems is the right of the people to make and alter their constitutions of government; but that the constitution which at any time exists, till

changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all."

Section 2. Laws for good of the whole – Burdens to be equally distributed – Due process – Equal protection – Discrimination – No right to abortion granted. – All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state. Nothing in this section shall be construed to grant or secure any right relating to abortion or the funding thereof.

Section 7. Requirement of presentment or indictment – Information by attorney-general – Grand juries – Double jeopardy. – Except in cases of impeachment, or in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger, no person shall be held to answer for any offense which is punishable by death or by imprisonment for life unless on presentment or indictment by a grand jury, and no person shall be held to answer for any other felony unless on presentment or indictment by a grand jury or on information in writing signed by the attorney-general or one of the

attorney-general's designated assistants, as the general assembly may provide and in accordance with procedures enacted by the general assembly. The general assembly may authorize the impaneling of grand juries with authority to indict for offenses committed any place within the state and it may provide that more than one grand jury may sit simultaneously within a county. No person shall be subject for the same offense to be twice put in jeopardy. Nothing contained in this article shall be construed as in any wise impairing the inherent common law powers of the grand jury.

STATEMENT OF THE CASE

In the instant case, the Supreme Court of the State of Rhode Island left the question of double jeopardy under the Rhode Island Constitution undecided. They stated *"Because we discern no circumstance warranting an exception to the dual sovereignty doctrine, ... (i)t is unnecessary to address the defendant's substantive double jeopardy argument."* *State v. Rodriguez*, 917 A.2d 409, 417 (R.I. 2007). Also left unresolved were alleged violations of federally protected constitutional rights including due process of law and equal protection under the law

The defendant's unresolved federal constitutional claims shall be part of this Certiorari Petition.

REASONS FOR GRANTING THE PETITION

THE SUPREME COURT SHOULD GRANT CERTIORARI IN THIS CASE TO ESTABLISH WHETHER A CAPITAL DEFENDANT MAY BE PROSECUTED IN MULTIPLE JURISDICTIONS WHERE THERE IS NO PROOF AS TO WHERE THE CAPITAL CRIME OCCURRED. THIS COURT IS REQUIRED TO DICTATE THE REACH OF THE 5TH & 14TH AMENDMENTS OF THE CONSTITUTION UNDER THE CIRCUMSTANCES IN THIS CASE.

QUESTION NUMBER 1

MAY A FEDERAL DISTRICT COURT REVIEW STATE ERRORS RESULTING IN A DENIAL OF AN INDIVIDUAL'S FEDERAL PROTECTED CONSTITUTIONAL RIGHTS IN A FELONY MURDER PROCEEDING INCLUDING DUE PROCESS OF LAW AND EQUAL PROTECTION UNDER THE LAW?

The Supreme Court of the United States decided that federal habeas review of state law is permissible where there is an independent due process violation. *Lewis v. Jeffers*, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed. 606 (1990). The 1st Circuit has followed this principle *Evans v. Verdini*, 466 F.3d 141 (1st Cir. 2006). The Court stated "To state a federal habeas claim concerning a state criminal conviction, the petitioner must allege errors that violate the Constitution." The rule that federal habeas relief does not lie for errors of State law is inapplicable in the instant case. The "errors" are not mere errors of State

law but rather are errors denying the Petitioner federally protected Constitutional rights including Due Process of Law. The State Court's finding was arbitrary or capricious and constitutes an independent due process violation. The District Court, in denying the Writ, stated: "To the extent that Petitioner bases his petition for habeas corpus on the alleged violation of Rhode Island's constitution and laws instead of the Federal Constitution and laws, his petition in this Court must be dismissed." On the contrary, counsel for the Petitioner in his objections to the report and recommendation of the Magistrate, alleged Federal Constitutional violations (at pages 3-4): "Clearly, the petitioner's right to both substantive and procedural due process of law under both the United States Constitution and the Rhode Island Constitution are being violated. The Petitioner's right to due process of law is guaranteed through the Fourteenth Amendment to the United States Constitution." Both the United States District Court and the Supreme Court of the State of Rhode Island have left unresolved the Petitioner's claim that his constitutionally protected right to substantive and procedural due process of law has been violated. This claim must now be adjudicated to determine if the United States District Court may review the decision of the Supreme Court of the State.

QUESTION NUMBER 2

DID THE STATE OF RHODE ISLAND VIOLATE THE DEFENDANT'S RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS OF THE LAW UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF RHODE ISLAND?

Under existing federal law, in the case of felony murder the underlying felony is held to be a lesser included offense of the murder statute and for that reason a separate trial for the underlying felony is specifically forbidden.

It is the appellant's position that when the conviction for the greater crime, felony murder, could not be had without conviction for the lesser crime, the kidnapping, the double jeopardy clause bars prosecution for the lesser crime after conviction for the greater one. *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed. 2d 1054 (1977).

The Supreme Court of the United States in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed. 2d (1980) explained their reasoning in *Harris v. Oklahoma* (supra). They stated:

> In Harris, we held, without dissent, that a defendant's conviction for felony murder based on a killing in the course of an armed robbery barred a subsequent prosecution against the same defendant for the robbery. . . .

> *FN9* But for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense.

In a concurring opinion in the case of *Lewis v. United States*, 523 U.S. 155, 118 S.Ct. 1135, 140 L.Ed. 2d 271 (1998), Justice Scalia provides further insight to the distinction between *Blockburger v. United States*, 284 U.S. 299 (1932) and *Harris*. Justice Scalia stated:

> The Blockburger test, however, establishes what constituted the "same offense" for purposes of the traditional practice that underlies the Double Jeopardy Clause, U.S. Const., Amend. 5. That constitutional guarantee not only assumes a scheme of "offenses" much more orderly than those referred to by the ACA (since they are the offenses designed by a single sovereign), but also pursues policy concerns that are entirely different. When it is fair to try a defendant a second time has little to do with when it is desirable to subject a defendant to two separate criminal prohibitions. Thus, for example, double jeopardy law treats greater and lesser included offenses as the same, see, *e.g. Harris v. Oklahoma*, 433 U.S. 6892, 97 S.Ct. 2912, 53 L.Ed. 2d 1054 (1977) *(per curiam),* so that a person tried for felony murder cannot subsequently be prosecuted

> for the armed robbery that constituted the charged felony. That is fair enough; . . . .

In *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed. 2d 715 (1980) the court prohibited a consecutive sentence for felony murder (the underlying felony being rape) and for the rape itself. The Court stated:

> In this case, resort to the *Blockburger* rule leads to the conclusion that Congress did not authorize consecutive sentences for rape and for a killing committed in the course of the rape, since it is plainly not the case that "each provision requires proof of a fact which the other does not." A conviction for killing in the course of a rape cannot be had without proving all the elements of the offense of rape. See *United States v. Greene*, 160 U.S.App.D.C. 21, 34, 489 F.2d 1145, 1158 (1973). *Cf. Harris v. Oklahoma*, 433 U.S. 682, 682-83, 97 S.Ct. 2912, 2912-13, 53 L.Ed. 2d 1054. The Government contends that felony murder and rape are not the "same" offense under *Blockburger,* since the former offense does not in all cases require proof of a rape; that is, D.C.Code § 22-2401 (1973) proscribes the killing of another person in the course of committing rape *or* robbery *or* kidnapping *or* arson, etc. Where the offense to be proved does not include proof of a rape – for example, where the offense is a killing in the perpetration of a robbery – the offense is of course different from the offense of rape, and the Government is correct in believing that

cumulative punishments for the felony murder and for a rape would be permitted under *Blockburger*. In the present case, however, proof of rape is a necessary element of proof of the felony murder, and we are unpersuaded that this case should be treated differently from other cases in which one criminal offense requires proof of every element of another offense. There would be no question in this regard if Congress, instead of listing the six lesser included offenses in the alternative, had separately proscribed the six different species of felony murder under six statutory provisions. It is doubtful that Congress could have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.*[FN8]* To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt must be resolved in favor of lenity. See *Simpson v. United States*, 435 U.S. 6, 14-15, 98 S.Ct. 909, 914, 55 L.Ed. 2d 70 (1978); *see also n. 10, infra.*

FN8 Contrary to the view of the dissenting opinion, we do not in this case apply the *Blockburger* rule to the facts alleged in a particular indictment. *Post,* at *1447-49.* We have simply concluded that, for purposes of imposing cumulative sentences under D.C.Code § 23-112, Congress intended rape to be considered a lesser offense included within the offense of a killing in the course of rape.

The same line of reasoning was utilized in *U.S. v. Dixon*, 509 U.S. 688, 113 S.Ct. 2189 (1993). In that case, the Supreme Court, Justice Scalia held that: (1) double jeopardy protections apply to non-summary criminal contempt prosecution; (2) double jeopardy precluded prosecution of defendant for drug offense following conviction for criminal contempt based on violation of conditional release order which included prohibition on violation of the drug laws; (3) double jeopardy precluded prosecution for assault on his wife following prosecution for criminal contempt for violating civil protection order which prohibited assault on her; (4) double jeopardy protections do not require that subsequent prosecution satisfy a "same conduct" test; and (5) prosecution for violation of civil protection order by assaulting his wife did not preclude subsequent prosecutions for assault with intent to kill and threatening to kidnap or injure another.

The Court stated:

> In this situation, in which the contempt sanction is imposed for violating the order through commission of the incorporated drug offense, the later attempt to prosecute Dixon for the drug offense resembles the situation that produced our judgment of double jeopardy in *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed. 2d 1054 (1977) *(per curiam)*. There we held that a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same

> underlying felony. We have described our terse *per curiam* in *Harris* as standing for the proposition that, for double jeopardy purposes, "the crime generally described as felony murder is not 'a separate offense distinct from its various elements.'" *Illinois v. Vitale*, 447 U.S. 410, 420-21, 100 S.Ct. 2260, 2267, 65 L.Ed. 2d 228 (1980). *Accord, Whalen v. United States*, 445 U.S. 684, 694, 100 S.Ct. 1432, 1439, 63 L.Ed. 2d 715 (1980). So too here, the "crime" of violating a condition of release cannot be abstracted from the "element" of the violated condition. The *Dixon* court order incorporated the entire governing criminal code in the same manner as the *Harris* "felony murder" statute incorporated the several enumerated felonies. Here, as in *Harris,* the underlying substantive criminal offense is "a species of lesser-included offense."*[FN2]*

Vitale, supra, 447 U.S., at 420, 100 S.Ct., at 2267. *Accord, Whalen, supra.*

The Supreme Court has been consistent. Repeatedly, they address the underlying felony of a felony-murder prosecution as a lesser-included offense.

It is specifically alleged that it is a violation of the federally protected Constitutional rights to substantive and procedural due process of law to subject the defendant to a trial for the lesser included offense of kidnapping when he has already been convicted of the greater offense, felony murder.

Interestingly, the Supreme Court of the State of Rhode Island apparently agrees. Article I, Section 2, of the Constitution of the State of Rhode Island protects the individual's right to due process of law. Article I, Section 7 guarantees the individual freedom from double jeopardy prosecutions.

In *Mastracchio v. Houle*, 416 A.2d 116 (R.I. 1980), the Supreme Court of the State of Rhode Island held:

> Separate convictions in respect to felony murder and the underlying felony charge, which was an indispensible element in the greater offense, are specifically forbidden by our holding in *State v. Innis*, 391 A.2d 1158 (R.I. 1978),*[FN5]* pursuant to principles enunciated *in Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed. 2d 1054 (1977), and earlier foreshadowed by our holdings in *State v. Grullon*, 117 R.I. 682, 371 A.2d 265 (1977), and *State v. Boudreau*, 113 R.I. 497, 322 A.2d 626 (1974).

The fundamental protections of the Due Process Clause of the United States Constitution are central to the administration of justice. In *Danforth v. Minnesota*, 128 S.Ct. 1029, at 1053-54 (2008), the Court noted:

> Justice Story, writing for the Court, noted nearly two centuries ago that the Constitution requires "*uniformity* of decisions throughout the whole United States, upon all subjects within [its] purview." *Martin v. Hunter's Lessee*, 1 Wheat. 304, 347-48, 4 L.Ed. 97 (1816). Indeed, the "fundamental principle"

> of our Constitution, as Justice O'Connor once put it, is "that a single sovereign's law should be applied equally to all." Our Judicial Federalism, *35 Case W. Res. L.Rev. 1, 4 (1985)*. States are free to announce their own state-law rules of criminal procedure, and to apply them retroactively in whatever manner they like. That is fully consistent with the principle that "a single sovereign's law should be applied equally to all." But the Court's opinion invites just the sort of disuniformity in federal law that the Supremacy Clause was meant to prevent. The same determination of a federal constitutional violation at the same stage in the criminal process can result in freedom in one State and loss of liberty or life in a neighboring State.*[FN2]*
>
> *FN2.* The Court's opinion allows "a single sovereign's law" – the Federal Constitution, as interpreted by this Court – to be applied differently in every one of the several States.
>
> The Court points out that the defendants in such a case are differently situated because they violated the laws of and were tried in different States. *Ante,* at 1046-1047. But disparate treatment under substantively different state laws is something we expect in our federal system; disparate treatment under the same Federal Constitution is quite a different matter.

Indeed, the Supreme Court of the State of Rhode Island, in giving precedence to the dual

sovereignty doctrine over its own Constitution and State precedents defining constitutionally protected rights in cases of felony murder, is flagrantly violating those individual rights. The dual sovereignty doctrine, when applied to the underlying felony murder after a conviction for the felony murder, should not be used as a "trump" card to overlook all constitutional rights including, without limitation, the right to Due Process of Law and the right to be free of a prosecution that clearly constitutes double jeopardy.

QUESTION NUMBER 3

WAS THE DEFENDANT ENTITLED TO AN EVIDENTIARY HEARING TO DETERMINE IF THE *BARTKUS* EXCEPTION TO THE DUAL SOVEREIGNTY DOCTRINE WAS APPLICABLE?

"(D)ue process is flexible and calls for such procedural protections as the particular situation demands," *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d 484 (1972).

All Courts have ruled that the defendant's constitutionally protected right to be free from double jeopardy has been trumped by the State's right to the doctrine of dual sovereignty.

Without conceding that the dual sovereignty doctrine should be applied in cases of felony murder, the Petitioner has argued that the exception to the Doctrine of Dual Sovereignty set forth in *Bartkus v.*

Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed. 2d 684 (1959) should apply in the instant circumstances. The First Circuit recognizes that doctrine under limited circumstances. *United States v. Guzman*, 85 F.3d 823, (1st Cir. 1996).

The District court dismissed the petitioner's claim stating that he failed to establish a prima facie case.

It is respectfully contended that based on the evidence presented thus far, an evidentiary hearing is mandated by his constitutionally protected right of procedural due process. Basic fairness requires access to the truth. It is obvious that a deal was made between the prosecutors for the State of New York and the State of Rhode Island. This "deal" was made in addition to the cooperation between the detectives in both states. The deal should be revealed!

1. Two defendants were arrested. One was extradited to Rhode Island, the other was not.
2. Rhode Island indicted for the underlying felony of kidnapping only. There was no murder count. New York did not indict for kidnapping, but it did indict for felony murder.
3. The Grand Juries in New York and Rhode Island deliberated at approximately the same time.
4. Both states awarded the alleged accomplice, Martha Villalona, with immunity.

The District Court infers that the aforementioned is only indicative of cooperation however this inference was not based on all of the facts. The complete set of facts may only be found by requiring the prosecutors to give testimony at an evidentiary hearing.

While "mere cooperation" is one possible conclusion, this horse-trading of one half the counts for one half of the defendants may also indicate that there was a plan intended and executed to deprive the defendant of his constitutionally protected rights and to subject him to two consecutive trials, one for the felony murder and the second for the lesser included underlying felony. If this be the case, then the prosecutors conspired to violate the defendant's right to basic fairness. In so doing they may have waived their right to claim that the doctrine of dual sovereignty applies in this limited instance.

Both prosecutors have refused to discuss their "negotiations" with each other. Access denied is justice denied. It is respectfully contended that procedural due process requires an evidentiary hearing to determine the facts of the matter.

Given the facts already uncovered by the Petitioner, the burden of proof must shift to the prosecutors to demonstrate that their actions constituted nothing more than "cooperation" and did not constitute a plan to violate the petitioner's right to due process of law.

"Domination" by one sovereign making the other a mere "tool" is not the only viable rationalization for the exception to the dual sovereignty doctrine. When two prosecutors mutually agree to a procedure that is intended to deprive a defendant of due process of law that constitutes an "end-run" around the constitutionally protected rights of a defendant and should also invoke an exception to the dual sovereignty doctrine.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RAYMOND STEVEN SUSSMAN, ESQUIRE

Counsel for the Petitioner

Date: 11-25-2009

United States Court of Appeals
For the First Circuit

No. 08-2034

MARCOS RODRIGUEZ,

Petitioner, Appellant,

v.

DAVID MCCAULEY, in his official capacity as Warden, Et Al.,

Respondents, Appellees.

Before

Torruella, Stahl and Lipez,
Circuit Judges.

JUDGMENT

Entered: August 28, 2009

We have reviewed the parties' briefs and the record, and substantially for the reasons stated in the district court's decision, *see Rodriguez* v. *McCauley*, No. 08-112, 2008 WL 3200724 (D.R.I. Aug. 6, 2008), we affirm the judgment. We agree with the district court that the dual sovereign rule forecloses the petitioner-appellant's double jeopardy claim, and that the undisputed facts presented here "show nothing more than the rendering of routine intergovernmental assistance." *United States* v. *Guzman*, 85 F.3d

823, 828 (1st Cir. 1996). Under these circumstances, we further conclude that the district court did not err in declining to hold an evidentiary hearing.

Affirmed. See 1st Cir. Loc. R. 27.0(c).

By the Court:

/s/ Richard Cushing Donovan, Clerk.

cc:
Edward J. McEnaney
Raymond S. Sussman
Aaron L. Weisman

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MARCOS RODRIGUEZ,

Petitioner,

v. C.A. No. 08-112ML

DAVID McCAULEY, in his official capacity as Warden, and STATE OF RHODE ISLAND,

Respondents.

MEMORANDUM AND ORDER

This matter is before the Court on the objection filed by Petitioner to a Report and Recommendation issued by Magistrate Judge Almond on June 13, 2008. Magistrate Judge Almond recommends that the State of Rhode Island's[1] motion to dismiss the petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 be granted. This Court has reviewed the Report and Recommendation and Petitioner's memorandum in support of his objection. Finding no merit in Petitioner's contentions, this Court adopts the Report and Recommendation. The petition for habeas corpus is DENIED and DISMISSED.

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[1] Although, the petition for habeas corpus names both the State of Rhode Island and David McCauley in his official capacity as respondents, the motion to dismiss was filed on behalf of the State of Rhode Island only. The Court presumes that the State of Rhode Island filing also applies to McCauley because of his official capacity status.

I. Standard of Review

Pursuant to Fed. R. Civ. P. 72(b)(3), a district judge must consider de novo any part of a magistrate judge's report and recommendation on a dispositive motion to which a proper objection has been made. A motion to dismiss a petition for habeas corpus, as in this case, is a dispositive motion and, therefore, this Court reviews de novo the issues under objection. Fed. R. Civ. P. 72(b).

II. Background

The relevant facts are undisputed. On about May 23, 1999, Ricardo Gomez was kidnapped in Rhode Island. Two days later, his remains were found in the Bronx, New York. Police investigators from Rhode Island and New York identified two alleged perpetrators: Petitioner and Edward Pozo. Both were arrested in New York. Petitioner was convicted of second-degree felony murder in New York. He was then transported to Rhode Island under the Interstate Agreement on Detainers Act, where he awaits trial on charges of kidnapping and conspiracy to commit kidnapping.[2]

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[2] The Report and Recommendation contains more detailed facts.

III. Objection One

Petitioner first objects that Magistrate Judge Almond improperly narrowed his analysis to consider only dual sovereignty as dispositive of all the issues raised in the brief. Petitioner argues that applying dual sovereignty in this case violates Rhode Island's constitution and laws. This objection can be addressed without delving into its substance. "'Federal habeas corpus relief does not lie for errors of state law.'" *Evans v. Verdini*, 466 F.3d 141, 145 (1st Cir. 2006) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990)). To the extent that Petitioner bases his petition for habeas corpus on the alleged violation of Rhode Island's constitution and laws instead of the Federal Constitution and laws, his petition in this Court must be dismissed. Therefore, Petitioner's first objection fails.

IV. Objection Two

Petitioner next alleges that Magistrate Judge Almond erred in finding that the Bartkus exception does not apply in this case. Petitioner also objects to the Magistrate Judge's decision not to grant an evidentiary hearing on this matter.

In essence, Petitioner argues that, due to the Bartkus exception, the prosecution against him in Rhode Island for kidnapping violates the Double Jeopardy Clause. The Fifth Amendment's Double Jeopardy Clause prohibits repeated prosecution of a criminal defendant for the same offense. U.S. Const.

amend. V; *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). Also prohibited by the Double Jeopardy Clause is prosecution of an offense when that offense is an indispensable element in a greater offense previously prosecuted. *Harris v. Oklahoma*, 433 U.S. 682, 682 (1977). For example, where conviction for felony murder requires proof of the felony of robbery with firearms, a subsequent prosecution for robbery with firearms violates the Double Jeopardy Clause. *Id.* In this case, the underlying felony in the felony murder charge of which Petitioner was convicted in New York was kidnapping. Petitioner contends that because Rhode Island is now prosecuting him for kidnapping, he is being prosecuted twice for the same offense.[3]

A second prosecution for the same offense does not violate the Double Jeopardy Clause, however, when the prosecutions are conducted by different states. *Heath v. Alabama*, 474 U.S. 82, 88 (1985). Under the dual sovereignty doctrine, even identical offenses are not considered the "same offence [sic]"

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[3] This Court assumes without deciding that the offense of kidnapping in both states is the same offense for purposes of the Double Jeopardy Clause. *See United States v. Fornia-Castillo*, 408 F.3d 52, 69 (1st Cir. 2005) ("'[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'"). Because the Court concludes that the Bartkus exception does not apply, this assumption does not change the outcome in this case.

within the meaning of the Double Jeopardy Clause when they are prosecuted by independent sovereigns. *See id.* Rather, when a defendant breaks the law of two separate sovereigns, "he has committed two distinct 'offences [sic].'" *Id.* Here, the two prosecutions against Petitioner have been conducted by two independent sovereigns: Rhode Island and New York. *See id.* at 88-89.

Nevertheless, Petitioner argues that the dual sovereignty doctrine does not apply to his case because of the Bartkus exception. Bartkus is a narrow exception to the dual sovereignty doctrine. *United States v. Guzman*, 85 F.3d 823, 826-27 (1st Cir. 1996). In *Bartkus v. Illinois*, the Supreme Court stated that where a state prosecution is merely "a sham and a cover for a federal prosecution," the dual sovereignty exception to double jeopardy does not apply. *See* 359 U.S. 121, 123-24 (1959). While some circuits have discounted the language in *Bartkus* as dictum, the First Circuit upheld the Bartkus exception in *Guzman*. *Guzman*, 85 F.3d at 826-27. The First Circuit, however, heavily emphasized the narrowness of the exception. *Id.* at 827. The court stated: "[The Bartkus exception] is limited to situations in which one sovereign so thoroughly dominates or manipulates the prosecutorial machinery of another that the latter retains little or no volition in its own proceedings." *Id.* Cooperation between independent sovereigns is not enough. *Id.* at 828. On the contrary, cooperative law enforcement efforts are "commendable." *Id.* A defendant must go further by showing

that one sovereign is "merely a tool" of the other. *See id.* at 826 (quoting *Bartkus*, 359 U.S. at 123). The First Circuit set a high standard of proof to make this showing by establishing the following burden-shifting regime:

> [T]he defendant must produce some evidence tending to prove that [dual sovereignty] should not apply because one sovereign was a pawn of the other, with the result that the notion of two supposedly independent prosecutions is merely a sham. If the defendant proffers evidence sufficient to support such a finding – in effect, a prima facie case – the government must shoulder the burden of proving that one sovereign did not orchestrate both prosecutions, or, put another way, that one sovereign was not a tool of the other. *Id.*

Here, Petitioner avers that Rhode Island and New York conspired together to circumvent the Double Jeopardy Clause by striking a "deal" to prosecute him twice for the same offense. (*See* Objection 6.) He presents the following evidence to show that the Bartkus exception applies to his case. First, before indictments were filed in either state, the Rhode Island Attorney General requested extradition only for Pozo and not for Petitioner. Secondly, the Rhode Island Grand Jury indicted Petitioner only for kidnapping, whereas the New York Grand Jury indicted him only for felony murder. Thirdly, both states' Grand Juries considered the evidence and filed indictments at approximately the same time. Fourthly,

both states gave immunity to Martha Villalona, allegedly the accomplice-girlfriend of Petitioner. This evidence, contends Petitioner, shows that the two states consciously "split the baby" to ensure that he would be prosecuted twice for kidnapping.

The chief flaw in Petitioner's argument is that evidence of a "deal" between two sovereigns does not establish a prima facie case. (*See id.*) First, the dual sovereignty doctrine sanctions prosecution by two states for the same offense. *Heath*, 474 U.S. at 88. Thus, the fact that two states cooperated to achieve two such separate prosecutions is lawful. Secondly, the law not only tolerates but encourages cooperation between law enforcement in different states. *See Guzman*, 85 F.3d at 828 ("Cooperative law enforcement efforts between independent sovereigns are commendable, and, without more, such efforts will not furnish a legally adequate basis for invoking the *Bartkus* exception to the dual sovereign rule."). The wrong occurs when one sovereign is "merely a tool" of the other. *See id.* at 826.

Nothing in Petitioner's evidence, however, suggests that one state "dominate[d]" the "prosecutorial machinery" of the other. *See id.* at 827. To the contrary, the evidence shows both states vigorously and independently investigating the crime and then prosecuting Petitioner to the extent of their respective laws. The fact that New York prosecuted Petitioner for murder and that Rhode Island prosecuted him for kidnapping is not, as Petitioner suggests, evidence of a nefarious conspiracy to commit an "end

run" around the Double Jeopardy Clause. (*See* Objection 5.) Rather, the different charges reflect the evidence showing that the alleged offenses occurred in different locations. After all, the victim was kidnapped in Rhode Island, but his body was discovered in New York. That the Grand Juries in both states met during the same time period is, at best, evidence of cooperation during the states' criminal investigations. Finally, it is hardly suspect that both states gave Villalona immunity when she was an important witness to the alleged crimes.

In sum, this Court finds that Petitioner has not presented adequate evidence to support a prima facie case. *See Guzman*, 85 F.3d at 827. Further, this Court finds that an evidentiary hearing would not improve matters. Petitioner's meager evidence falls far short of raising a suspicion that the prosecution in Rhode Island is "a sham and a cover" for prosecution by New York. *See Bartkus*, 359 U.S. at 124. At most, Petitioner's evidence suggests cooperation, which, as discussed, does not satisfy the standard for the Bartkus exception. *See Guzman*, 85 F.3d at 827-28. Thus, Petitioner's second objection also fails.

V. Conclusion

Accordingly, the petition for habeas corpus is denied and dismissed.

SO ORDERED

/s/ Mary M. Lisi
Mary M. Lisi
United States District Judge
August 6, 2008

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

MARCO RODRIGUEZ **C.A. NO: 08-112ML**

v.

DAVID McCAULEY,
in his official capacity
as Warden and
STATE OF RHODE ISLAND

JUDGMENT

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

[X] Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED:

Judgment is hereby entered for the defendants, David McCauley and the State of Rhode Island, against the Plaintiff, Marco Rodriguez, pursuant to the Memorandum and Order dated August 6, 2008 accepting the Report and Recommendation of Magistrate Judge Lincoln D. Almond dated June 13, 2008 pursuant to Title 28 U.S.C. § 636(b)(1). The defendants' Motion to Dismiss is hereby GRANTED and the plaintiff's

Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 is DISMISSED.

Enter:

/s/ Barbara Barletta
Deputy Clerk

DATED: August 6, 2008